In the Supreme Court of the United States

October Term, 1977

No. 77-677

OWEN EQUIPMENT AND ERECTION COMPANY,
A Nebraska Corporation,
Petitioner,

vs.

GERALDINE KROGER, Administratrix of the
Estate of JAMES D. KROGER, Deceased,
Respondent.

Brief of Respondent on Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case as far as it goes and for the purpose of brevity incorporates by reference in addition thereto the factual history of the case as is contained in the opinion of the Court of Appeals in Judge Talbot Smith's review of the

facts as found in Appendix A and with which the petitioner has expressed no disagreement.

In addition thereto, feeling that petitioner has inadvertently transposed the chronological sequence of events in a manner that confuses rather than clarifies, respondent offers the following timetable of the history of the litigation for the convenience and assistance of the Court with emphasis supplied.

Timetable

January 18, 1972	Accident and death of Kroger.
November 24, 1972	Plaintiff's complaint was filed against Omaha Public Power District.
August 24, 1973	Omaha Public Power District filed a third party complaint against *Owen Construction Co., Inc.*
September 7, 1973	Omaha Public Power District filed motion for voluntary dismissal of Owen Construction Co., Inc., asking leave to file an amended third party complaint against Owen Equipment and Erection Company.
September 7, 1973	The Court entered an order pursuant to the motion ordering: "That third party Defendant, Owen Construction Co., Inc., *an Iowa Corporation,* should be and hereby is dismissed from this action, with prejudice.

IT IS FURTHER ORDERED that the defendant and third party plaintiff should be and hereby is granted permission to file an amended Third Party Complaint naming Owen Equipment and Erection Co., *a Nebraska Corporation,* as an additional third party defendant in this action."

September 11, 1973	Omaha Public Power District filed a Third Party Complaint against Owen Equipment and Erection Co. describing such company as *"a Nebraska Corporation."*
September 8, 1973	Plaintiff filed motion to add a party defendant, Owen Equipment and Erection Co., *a Nebraska Corporation.*
October 15, 1973	Owen Equipment and Erection Company filed an answer to the third party complaint filed by Omaha Public Power District in which it "Admits that Owen Equipment and Erection Company is a corporation organized and existing under the laws of the *State of Nebraska*" and denied generally all other allegations.
October 30, 1973	Omaha Public Power District filed motion for summary judgment.
November 9, 1973	Plaintiff filed amended complaint against Owen Equip-

	ment and Erection Co. describing it in caption as a *"Nebraska Corporation."*
November 27, 1973	Owen Erection & Equipment Co. filed an answer to plaintiff's complaint admitting that it was a corporation "organized and existing under the laws of the *State of Nebraska"* coupled with a general denial of the allegations of plaintiff's amended complaint.
January 18, 1974	*Iowa Statute of Limitation runs on state cause of action.*
February 12, 1975	Final judgment was entered in favor of Omaha Public Power District against the plaintiff.
February 14, 1975	Argument in Court of Appeals.
October 1, 1975	Judgment affirmed by United States Court of Appeals, Eighth Circuit.
November 14, 1975	A motion for summary judgment filed by Owen Equipment & Erection Co. against plaintiff (which had been filed September 24, 1974) was heard on depositions, affidavits and interrogatories and denied by the Court. Nowhere in either the motion for summary judgment or in the evidentiary hearing on the motion did Owen Equipment & Erection Co. raise any issue of jurisdiction or claim a lack of diversity or adduce facts as to where

	its claimed principal place of business might be.
January 12, 1976	Trial commenced and a jury was empaneled.
January 13, 1976	Plaintiff's evidence was adduced.
January 14, 1976	Just before noon the attorney for Owen Equipment & Erection Co. asked the witness Petersen, secretary of Owen Equipment & Erection Co., an adverse witness called by plaintiff, if the principal place of business of the defendant was in Carter Lake, Iowa, and received an affirmative reply. Shortly after one o'clock p.m., on the third day of trial, defendant raised lack of diversity.

Comment: It will be noted from the above, that at the time the statute of limitations of Iowa ran on the cause of action under state law on January 18, 1974, all three parties were without question proper parties in litigation under Rule 14 subject to the jurisdiction of the United States District Court for the District of Nebraska, and all three parties remained so until October 1, 1975, when the summary judgment in favor of the third-party plaintiff was affirmed by the Court of Appeals.

A brief word about the situs of the events involved seems appropriate. It is a small piece of land on the west side of the Missouri River. Traditionally, it is believed that this great river clearly marks the boundary between

the states of Nebraska and Iowa; indeed, all but limited local maps show it to be. However, many years ago, that river avulsed at one of its bends and left a small piece of land on the west side of the river that remains Iowa. A small strip of Nebraska actually lies east of a strip of Iowa. The exact boundary lines in this geographical no-man's land are mostly unmarked and confusing. Several Omaha, Nebraska companies, including the petitioner in this case, own and maintain facilities in the area, some of them being on Iowa land, although they are Nebraska corporations. It has been the bane of map makers and law enforcement officers.

The respondent's decedent, the respondent and their family were residents of Iowa but living west of the Missouri River. The petitioner was and is a Nebraska corporation owning two large, heavy duty cranes which are mobile and operate in both states in areas completely west of the river. These constitute the sole physical assets of petitioner. (C. of A. App. 110 & 130.)

Through the negligence of the petitioner, the Owen Equipment and Erection Company, a Nebraska corporation, plaintiff's husband was killed by electrocution when standing near one of the petitioner's large cranes which was swung into an overhead high tension line, installed by the Omaha Public Power District of Nebraska (OPPD). No complaint is still made that the respondent's decedent was anything but an innocent victim of the negligence of the petitioner nor that the verdict was excessive in any way.

SUMMARY OF ARGUMENT

The argument of the respondent will discuss the following contentions:

1. The judgment below in favor of the respondent against the petitioner was just and a result to the contrary would have been unconscionable and that petitioner suffered no prejudice by being tried in federal as opposed to state court. While this statement at this appellate level may seem naive, respondent still believes that all else being equal it is a factor to be considered even in the most prestigious and sophisticated court in the world.

2. An affirmance based on a finding that in this particular case the trial court had the *power* to retain the case for ancillary disposition would in no way expand the jurisdiction of the federal courts or invite an increase in federal court litigation. To the contrary, an opinion delineating and limiting the factual situations wherein discretionary retention of ancillary jurisdiction should be exercised may well serve as a compendium of direction and accomplish an opposite result.

3. At the time Hon. Robert V. Denney, United States District Judge for the District of Nebraska, toward the end of the trial itself, elected to exercise his discretion to retain the cause for disposition, he based his decision on *United Mine Workers of America v. Gibbs,* 393 U.S. 715; two decisions of the highly respected Nebraska judge, Hon. Robert Van Pelt in *Olson v. United States,* 38 F.R.D. 285 and *Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co.,* 38 F.R.D. 486 (D. Neb. 1965); and the Second Edition of Professor *Moore's Federal Practice* (A. 60-62). In so doing, respondent contends Judge Denney was acting within his *power* and to have exercised his discretion in favor of a dismissal would have been an abuse of that discretion under the facts and circumstances of the case before him.

4. Respondent will further argue that the answer of petitioner filed *before* the Iowa statute of limitations had run, operated as a concealment of the possible jurisdiction question and was in violation of the purpose and intent of Fed. R. Civ. P. 8(b).

5. Respondent will discuss the pendent jurisdiction case of *Aldinger v. Howard,* 427 U.S. 1; 96 S. Ct. 2413 as being some indication on the part of the Court of understandable reluctance to bind the Federal judiciary to a hard, fast and inflexible course of conduct under rules involving either ancillary or pendent jurisdiction, particularly in cases where no new party has been added by the plaintiff and where plaintiff's claim against a third-party defendant, when filed, constituted a claim between parties already within the jurisdiction and power of the court, the non-retention of which would result in high injustice.

6. Respondent will further show (although there is no claim to the contrary) that no collusion existed between the respondent and the original defendant-third-party plaintiff, the record indicating that the dismissal of the original defendant was opposed by respondent all the way through the Court of Appeals (*Kroger v. Omaha Public Power District,* 523 F. 2d 161).

7. Petitioner's claims that its Fifth Amendment rights were violated by all three judges of the Court of Appeals by being interrogated by them in the courtroom regarding the case will also be discussed by respondent in the argument.

ARGUMENT

Once a federal court has before it all the parties to the controversy, sharing common and interrelated facts, it has the power in the jurisdictional sense, to dispose of the case and dismissal of the main action does not require dismissal of the third-party action, even though no independent grounds of jurisdiction may exist.

Petitioner's brief creates the impression that the jurisdiction in dispute here arises solely from the provisions of Rule 14 and that the court is being asked to stretch the rule to extend jurisdiction.

The Second Circuit in *Dery v. Wyer* explains the relationship between Rule 14 and the general subject of federal jurisdiction as follows:

> Rule 14 does not extend jurisdiction. It merely sanctions an impleader procedure which rests upon the broad conception of a claim as comprising a set of facts giving rise to rights flowing both to and from a defendant. For solution of the incidental jurisdictional problems which often attend utilization of the procedure, the concept of ancillary jurisdiction, which long antedated the Federal Rules, may often be drawn upon. (*Dery v. Wyer,* 265 F. 2d 804, C. A. 2d, 1959.)

In addition to the right of a defendant to implead a third-party defendant, a plaintiff may assert a claim against such third-party defendant if that claim arises out of the transaction that is the subject matter of plaintiff's claim against the original defendant. Since the plaintiff's claim against the third-party defendant arose out of a transaction that is already before the court, and since the third-party defendant was already a party

before the plaintiff asserted her claim against it, the court had jurisdiction, or the power, if you will, to hear it even though there is no independent basis of federal jurisdiction between the plaintiff and the third-party defendant.

This, of course, is respondent's contention herein.

The right to hear the action out after dismissal of the original defendant arises out of the *power* of the court acquired at the time all three parties were before it. However, that power is susceptible to being exercised only in proper circumstances in the discretion of the court, and it may be withheld if not warranted by the facts.

It is respondent's position that the exercise of the court's discretion in that regard in this particular case was fully proper and wholly justified and did not constitute an abuse of discretion by that court.

It would be of dubious value to present a roll call of the circuits since *Gibbs* on questions of ancillary and pendent jurisdiction. To add to such a roll call the numerous decisions both ways at District court levels since 1966 would lengthen respondent's brief without justification. Neither would it profit anyone to debate whether such post-*Gibbs* swing by those courts that have changed favors the so-called minority rule over the so-called majority rule.

The fact of disagreement is presumably why we are here.

With the writings on the subject, by Moore, Wright, Miller, Hart, Wechsler and Fraser, it would be presumptuous for this advocate to attempt to add some new juris-

dictional philosophy to that already accumulated. To respondent's knowledge, the section entitled "*Third-Party Claims*" in *Jurisdiction of the Federal Courts of Actions Involving Multiple Claims,*" Fraser, 1978, 76 F.R.D. 525 at pp. 535-546 is the most recent updating of decisions on the subject, its publication being in the February, 1978 issue.

A further difficulty that arises in connection with any attempt to analyze lower court decisions is the fact that at a district court level, if the action is dismissed at a pre-trial stage, the probability is that the state court remedy still is available and rather than take the time and chance of an appeal, during which the state statute of limitations may run, the dismissed out party would simply file the state court action. Respondent had no such alternative. All three parties were in federal courts for over a year and eight months after the state statute had run.

Petitioner in effect demands a rule of total inflexibility as a means of prevailing under the facts of this case. Total inflexibility could, in a given case, be tantamount to total injustice. We submit it is devoutly to be avoided.

Wright & Miller, *Federal Practice and Procedure,* Sec. 1444, pps. 221-2, phrases it more adequately:

> "But the amorphous character of the ancillary jurisdiction must always be kept in mind. Its application in a particular case cannot be determined simply by referring to a statute or resorting to some type of mechanical test. A court's decision whether or not it has ancillary jurisdiction in a given context will depend upon what it believes constitutes the boundary of the "claim" in the action. Whether-

less, the real basis for a court's determination is not simply a matter of guesswork. The decision ultimately will be based on a weighing of the court's desire to preserve the integrity of constitutionally based jurisdictional limitations against the desire to dispose of all disputes arising from one set of facts in one action. The advantage of a pliable ancillary jurisdiction concept is that in the long run a balance between the two opposing objectives will be struck that is responsive to the underlying policies of Rule 14."

(Wright and Miller, *Federal Practice and Procedure,* §1444 at 221-2.)

Judge Talbot Smith's majority opinion in the case at bar, while directing itself to the issues raised, by us, exceeded in depth our best efforts on the brief. To attempt improvement on it would be inappropriate and it is, of course, representative of our position without further reprinting or comment.

However, *Dery v. Wyer,* cited supra, is deserving of quotation as supportive of respondent's position. The Second Circuit's language that seems germane is as follows:

"We also hold that the ancillary jurisdiction over the third-party complaint was not lost when the main cause of action was settled. Generally, in a diversity action, if jurisdictional prerequisites are satisfied when the suit is begun, subsequent events will not work an ouster of jurisdiction. Mullen v. Torrance, 9 Wheat, 536, 6 L. Ed. 154; St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 58 S. Ct. 586, 82 L. Ed. 845; Hardenbergh v. Ray, 151 U.S. 112, 14 S. Ct. 305, 38 L. Ed. 93. This result is not attributable to any specific statute or to any language in the statutes which confer jurisdiction.

It stems rather from the general notion that the sufficiency of jurisdiction should be determined once and for all at the threshold and if found to be present then should continue until final disposition of the action. Moreover, in cases involving the impact of jurisdictional problems on the joinder of claims under Rule 18 it has been held that jurisdiction of the ancillary claims survives the final disposition of the main claim. American Fidelity & Casualty Co. v. Owensboro Milling Co., supra; Lindquist v. Dilkes, 3 Cir., 127 F. 2d 21. In principle, the same rule would seem to be applicable to third-party claims which under Rule 14 must rest on the same transaction or set of facts as the main claim and thus fall within the 'First category' described in Hurm v. Oursler, supra, 289 U.S. at page 246, 53 S. Ct. at page 590.

"Considerations of policy, as well as the foregoing analogies, accord with our conclusion. If the main claim and the third-party claim are tried together and a decision or a settlement in favor of the plaintiff is announced on the main claim in advance of decision of the third-party claim, to hold that the determination of the main claim ousted the court of jurisdiction over the ancillary claim would in many cases entail a serious waste of effort by both the judge and the litigants. The natural tendency would be to discourage settlements. And the same considerations, though perhaps to a lesser degree, would tend to discourage adjudications on motions and settlements in advance of trial. Confusion would result from such doctrine not only as to the timing but also as to the nature of the event causing loss of the ancillary jurisdiction. If the jurisdictional loss were held not to flow from a settlement of the main claim after trial, can it consistently be held that a settlement thereof at some pre-trial stage will operate to terminate jurisdiction over the

third-party claim? Is an out-of-court agreement of settlement an operative jurisdictional factor, or must the agreement be translated into a judicial order to dismiss the claim as moot or to enforce the settlement? Not infrequently, if ancillary jurisdiction were thus subject to defeasance, the third-party claim might be time-barred although, to be sure, that seems not to be an immediate hazard in this case. In short, a rule that ancillary jurisdiction of a third-party claim terminates on a determination of the main claim will seriously impair the utility of the Rule, breed confusion and generate many sterile jurisdictional disputes.

"We find no authority in conflict with our holding. It is true that there are a number of cases holding that a court, just as it has discretion under Rule 14 to implead a third-party, may in its discretion dismiss the third-party complaint. In some cases the discretion to dismiss has been exercised. Duke v. Reconstruction Finance Corp., 4 Cir., 209 F. 2d 204; State of Maryland to Use and Benefit of Wood v. Robinson, D.C.D. Md., 74 F. Supp. 226. In other cases, the court in the exercise of its discretion has retained jurisdiction. Oakes v. Graham Towing Co., D.C.E.D. Pa., 135 F. Supp. 485. But this appeal involves no question as to such discretionary power in a trial court. No motion to dismiss was made below and the judge, instead of entering a discretionary dismissal, proceeded to try the third-party claim. We think the original ancillary jurisdiction survived." (*Dery v. Wyer,* 265 F. 2d 804, pp. 808, 809.)

An analysis of the arguments argued by supporters of a flat, inflexible prohibitory rule is given and answered by Professor Moore in the following:

"But regardless of jurisdictional developments under Rules 18 and 20, *United Mine Workers* can

authorize an independent relaxation of the rule against ancillary jurisdiction over plaintiff's amended claims against the third-party defendant. At the outset, the question must be redefined. It should not be a question of pure law posing the choice 'either there is ancillary jurisdiction and the court must take it, or there is no ancillary jurisdiction, and the court cannot take it.' Instead, since there is jurisdictional power to hear the whole case, the question is one of trial court discretion whether to exercise that jurisdiction, considering all the factors of economy and convenience in the context of federalism. *Once this basic redefinition takes place, the traditional reasons given for supporting a rule of flat prohibition do not necessarily disappear. Instead they become factors for the trial court to consider in exercising its discretion.*

"The first reason given in support of the prohibitory rule is that A.B. should not be allowed to do by an indirect route what he could not do directly. In response, it can first be argued that it is no longer so clear in all cases what A.B. is forbidden to do directly. But even so, why shouldn't A.B. be able to do it indirectly? A.B. took his chance in suing C.D. alone in the federal court. It was C.D.'s choice, not A.B.'s, to bring in E.F., and now that E.F. is before the court, judicial economy and convenience may dictate that the court dispose of the whole case by allowing all claims deriving from a common nucleus of operative fact.

"The second argument given to support the prohibitory rule is that it prevents collusion between A.B. and C.D. to obtain federal court jurisdiction over claims against E.F., when such jurisdiction would otherwise not exist. But the adequate answer to collusion is dismissal under 28 USC §1359. Fears of collusion do not justify a wholesale denial of jurisdiction.

"The third argument supporting the prohibitory rule is that E.F. has been brought in on the basis of ancillary jurisdiction over C.D.'s third-party claim even though E.F. is of the same citizenship as A.B. on the assumption that A.B. will seek no relief against E.F. This argument too narrowly states the grounds for ancillary jurisdiction over the claim of C.D. against E.F. While it is true that the argument was given in many past decisions as a reason for justifying ancillary jurisdiction over the third-party claim of C.D. against E.F., this past reasoning should not now constitute an absolute prohibition of additional ancillary jurisdiction over claims between A.B. and E.F. Ancillary jurisdiction is a much broader concept resting upon multiple reasons of economy and convenience. Thus, it is clearly established that ancillary jurisdiction allows jurisdiction over claims and counterclaims between C.D. and E.F. even though those claims lack diversity and jurisdictional amount and could not have been brought as original law suits. The same broad principle and result should not be offensive when applied to ancillary jurisdiction between A.B. and E.F. If E.F. had voluntarily entered the suit as a non-indispensable defendant by intervention under Rule 24(a), there clearly can be ancillary jurisdiction over the claims between E.F. and A.B. The same result should be obtained whether E.F. enters voluntarily under Rule 24 or involuntarily by C.D.'s impleader under Rule 14. In brief, there should be no rule forbidding building one ancillary jurisdiction on another.

"The fourth argument given is that federal dockets are so overcrowded that the federal courts should not reach out for state law based litigation. The answer to this argument is that under cooperative federalism the federal courts have a higher duty to end all court congestion, not just

that in the federal courts. If federal courts refuse to use conceptual tools to dispose of all related claims with the greatest economy and convenience, the federal courts then add to the total ineconomy and inconvenience which litigants must suffer to obtain justice on the merits of their claims.

"A fifth argument could be raised either that the prohibitionary rule was fixed prior to the Federal Rules and jurisdiction cannot be expanded by the Rules, or that the prohibition has become so fixed since the adoption of the Rules, that in either view, legislation is required to change it. The answer to this argument is found in the *United Mine Workers* theory that the new Federal Rules provisions for multi-claim, multi-party litigation do not constitute expansions of jurisdiction, but rather, the opportunity for the federal system fully to exercise dormant jurisdiction which preexisted but which was not developed for lack of procedural devices. Finally, even under the Rules, the majority precedent since 1938 is not so clear that the minority view can be adopted only with legislative approval.

"If federal courts continue the development of these trends, the most obvious case for taking jurisdiction of an amended claim by A.B. against E.F. would be where the claim by A.B. against C.D. rests upon exclusive federal court jurisdiction; the second most obvious case would be where the claim by A.B. against C.D. rests upon federal question jurisdiction concurrent with the state courts; the third case would be where the claim by A.B. against C.D. rests upon diversity, and there is diversity between A.B. and E.F., but A.B.'s claim against E.F. is below the jurisdictional amount; the last case would be where the claim by A.B. against C.D. rests upon diversity but there is no diversity between A.B. and E.F.; and finally there could be variations of these patterns.

It should be recalled that under the suggestions made here, the assertion of jurisdiction over claims would be grounded in discretionary power and thus would be subject to developing standards of discretion."

From: *Moore's Federal Practice,* 2nd Ed. pp. 14-570 to 14-574, Footnotes deleted — text only.

Expansion of Jurisdiction To Increase Federal Litigation?

The increase in federal litigation that could be occasioned by an affirmance on the facts of this case is so improbable as to be in effect impossible. Where would one find again the following factors and what would the odds be against finding them together in any other future case?

1. A geographical confusion such as exists west of the Missouri River as to a shred of Iowa.
2. A company that is incorporated in Nebraska and signs its pleadings, "A Nebraska Corporation," yet places its cranes, not exclusively but most of the time, in that shred of Iowa.
3. A company that has no employees (C. of A. App. 110) and no physical assets except two movable cranes which operate mostly but not exclusively in that scrap of Iowa on the west side of the river. (C. of A. App. 130.)
4. A company that answers a third party complaint under Rule 8(b) in the manner that is found in this case.
5. A situation where the plaintiff, the defendant and the third-party defendant were all properly in court at the time the state statute of limitations ran and all three remained properly in federal court for eighteen months thereafter.

6. A company that prepares, moves and presents a motion for summary judgment raising all points available *except* a jurisdictional claim.
7. A defendant who raises the issue for the first time in the waning moments of a jury trial.

Even without these unique factors *Wright and Miller* discount any claim that holding such an ancillary claim for disposition will increase the burden on the federal courts in the last sentence of the following analysis:

"Two arguments against applying ancillary jurisdiction generally are made. First, it is argued that plaintiff should not be allowed to do indirectly what he cannot do directly. If, for example, there is no diversity between plaintiff and the third-party defendant and the dispute between them does not involve a federal question, plaintiff could not sue him in an independent action and should not be allowed to assert a claim against him simply because he has been brought into the action by defendant. But this argument ignores the fact that plaintiff cannot determine whether the third-party defendant will be made a party to the action. The bringing in of the third-party is determined by the original defendant and recognizing ancillary jurisdiction in this context would not encourage plaintiff to initiate actions in the hope that the third-party defendant would be impleaded.

"The second objection to permitting ancillary jurisdiction is that the third-party defendant may have been made a party to the action as a result of collusion between plaintiff and defendant. The response to this fear is that rather than totally rejecting the use of ancillary jurisdiction in the context of claims by the original plaintiff against the third-party defendant, the courts should dismiss only

those claims that the third-party defendant can show have been asserted collusively. Also, as has been pointed out earlier, the type of impleader most likely to occasion collusion between plaintiff and the third-party defendant was eliminated by the 1948 amendment to Rule 14(a). Defendant no longer can bring in a third party solely on the basis that he is liable to plaintiff; he must be able to assert a claim against the third-party on his own behalf. If he asserts a valid third-party claim, presumably he will stand to benefit thereby; his other motives for doing so and the fact that it works to the benefit of the plaintiff should not be relevant. Moreover, any claim plaintiff may assert against the third-party must arise out of the transaction or occurrence that already has been made the subject of the court's jurisdiction and is between persons who have been made parties to the action. Exercising ancillary jurisdiction in such a case therefore will not increase the burden on the federal court appreciably and the possibility of reducing the overall burden on both the state and federal courts will be enhanced."

(Wright and Miller, *Federal Practice and Procedure*, §1444 at 229-32.)

Forum Choice

Petitioner makes much of the fact that respondent, in her original filing against Omaha Public Power District, chose the forum. True. It was a forum chosen for a case against what classifies in Nebraska as a political subdivision, which accounted for an early six month delay on what is known as a mandatory claim delay. The forum was not chosen to gain some advantage in a case against petitioner. The fact that some may assume that federal judges are superior in some way to other

judges should not give petitioner cause for complaint. Petitioner further makes no showing as to how the forum in any way prejudiced it, which of course, it did not.

It should be further noted that respondent was not an "in-state" plaintiff who gained geographical advantage by bringing her original action in the state of her residence.

Petitioner's Answer under Rule 8(b)

Two years prior to trial respondent's complaint against petitioner had charged that petitioner was a Nebraska corporation with its principal place of business in Nebraska. Petitioner did not deny this outright but utilized a qualified general denial admitting it was "organized and existing under the laws of the State of Nebraska and denied each and every other allegation. (C. of A. App. 19.)

In *Biggs v. Public Service Coordinated Transport*, 280 F. 2d 311 (3rd Cir. 1964) the plaintiff asserted a proper amount in controversy and that the defendant was a New Jersey corporation doing business in Pennsylvania. Defendant denied specifically the amount in controversy but the allegation that defendant was incorporated in New Jersey was only met by a qualified general denial. The *Biggs* court held:

> "We cannot for a moment believe that defendant's counsel was denying in good faith that his client was a New Jersey corporation. We think the only fair interpretation of the pleading in this case is that the denial does not run to the allegation of defendant's citizenship. Therefore, that allegation must be deemed to be admitted."

Aldinger v. Howard

In footnote 29 of Judge Talbot Smith's majority opinion in the case at bar, he recites:

> "Owen contends that the recent Supreme Court decision, Aldinger v. Howard (citing) supports its contention that the District Court was without power to exercise jurisdiction over Kroger's direct claim against it. We disagree."

His reasons for disagreement with Owen's contention in this regard are set out in the balance of the fairly lengthy footnote and need not be included again herein.

However, while covering the same principle of distinction, Judge Smith felt it probably unnecessarily cumulative to include other *Aldinger* language to a similar effect:

> "From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to implead an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant 'derive from a common nucleus of operative fact.'"

Being mindful of the fact that pendent rather than ancillary jurisdiction was being considered, it would seem that if a parallel philosophy were present it would

classify the present situation at bar as falling within the first rather than the second category of the above quoted excerpt.

Respondent impleaded no new party but when she filed she took a party already in the suit as she found it.

Di Frischia v. New York Central
(Third Circuit)

Petitoner criticizes Judge Smith's reliance on the case of *Di Frischia v. New York Central Railroad*, 279 Fed. 2d 141 (3rd Cir. 1960) and to prove its point cites "*Law of Federal Courts*, Charles Alan Wright."

While quoting one sentence from the volume, petitioner neglects to refer to the in-depth analysis of the issue at other sections of the 1970 Edition including the final conclusion at Chapter 10, page 380, last paragraph of Sec. 76 which reads:

> "Dismissal or settlement of the main action does *not* require dismissal of the third-party action, even though there are no independent grounds of jurisdiction for the third-party action, but if consideration of convenience will be equally well served, the court *has discretion* in such a situation to dismiss the third-party proceeding and leave these ancillary matters to be determined in the state courts." (Emphasis added.)

Kenrose v. Whitaker

The *Kenrose* Fourth Circuit case is much quoted and heavily relied on by petitioner. It points up the fact that there is a dispute between circuits on the breadth of ancillary jurisdiction but with a minority growing stronger, if not now close to equality.

Even *Kenrose* notes that factors may be present that should be taken into consideration in exercising some flexibility in assessing the presence or absence of jurisdiction and notes the fact that in *Kenrose* a state court remedy was still available, illustrated by the following language from *Kenrose:*

> "The value of efficiency in the disposition of lawsuits by avoiding multiplicity may be readily conceded, but that is not the only consideration a federal court should take into account in assessing the presence or absence of jurisdiction. Especially, is this true where, as here, the efficiency plaintiff seeks so avidly is available without question in the state courts."

Kenrose was in 1971. In September, 1975, the Fourth Circuit again had occasion to approach the area of ancillary jurisdiction in *Parker v. Moore,* 528 F. 2d 764. In that case an early in the case dismissal of a non-diverse defendant was affirmed but the language of the court is interesting:

> "In *Kenrose Mfg. Co. v. Fred Whitaker Co.,* 4th Cir., 512 F. 2d 890, we broadly held that there must be an independent basis of jurisdiction of a claim by a plaintiff against a third-party defendant. (Footnoting as follows)
>
> > 'After *Kenrose* was decided but before it was published, there was a case in the Eastern District of Virginia in which it was decided that, under the doctrine of pendent jurisdiction, contract claims could be asserted in the diversity jurisdiction even though there was no diversity of citizenship between the plaintiff and one of the two co-defendants when the principal alleged obligor was the diverse defendant. We think that a misuse of the pendent jurisdiction doctrine, which was designed to extend federal jurisdiction to encompass pendent state claims against defendants already in the case to defend the primary federal claims. It was not designed to bring into the diversity jurisdiction claims between parties who are citizens of the same state.'

"Were we inclined under any other context to reconsider the absolute rule of *Kenrose,* we would not find it appropriate to do so here."

The court then concluded in the following language:

> "We thus adhere to our ruling in *Kenrose,* at least in the circumstances of a case such as this, and conclude that there is no ancillary federal jurisdiction of the plaintiff's claim against Moore. The dismissal of his complaint as against Moore is therefore affirmed."

Is it our imagination or do we detect a possible uneasiness of the Fourth Circuit regarding the breadth and inflexibility of the holding in *Kenrose* as being subject to possible future modification given the right case and right circumstances?

Present State Court Remedy?

In his Eighth Circuit dissent, Judge Bright suggests that a possible remedy may exist even four years after the statute of limitations has run, under a "savings clause" of the State of Iowa. Frankly, to place alternative reliance on such, after five and a half years of litigation in the federal courts, is nebulous and uncertain as the laws of Iowa on this subject are as murky and indefinite as are the boundaries of the state on the west side of the Missouri River. To begin litigation again, even if possible, would be oppressive.

Predictably, carefully preserving a state court defense should it prevail in this appeal, the petitioner cautiously avoids printed comment, commitment or agreement with Judge Bright's suggested possible state court remedy.

One of the difficulties in analyzing the finality of both Circuit and District Court decisions on the issue in chief is that in most of the cases we are not able to tell whether a state court remedy was still available and that the cases were not appealed for that reason, the alternative state filing being made to avoid the uncertainty of an appeal.

Even the dissent in *Dery v. Wyer,* 265 F. 2d 804 (2d Cir. 1959) recites the fact of availability as follows:

> "If the district court dismissed the third-party complaint there would still be ample time for the Railroad to bring its indemnity action in the New York Courts as the liability of the Lumber Company did not arise until the Railroad was compelled to pay the plaintiff and hence the New York six year statute of limitations for actions on a contract has not run."

Thus it appears that the statute had not run in *Dery* and was considered as a factor of importance even in the dissent.

Petitioner's Claim of Fifth Amendment Violations

As a last ground for complaint herein the petitioner asks the court to grant it relief on the grounds that its Fifth Amendment rights were violated by the U.S. Court of Appeals for the Eighth Circuit in that the three judges of that Court interrogated petitioner's counsel in

the oral arguments on a matter on which petitioner's counsel was not prepared and was taken by surprise and infers that such unauthorized interrogation was in some way damaging to the petitioner.

This somewhat bizarre invocation of the Fifth Amendment is presumably based on the theory that it was unaware in advance of the oral arguments that complaint was being made about the untimeliness of raising the jurisdictional question. At line 18, page 36 of Petitioner's Brief for Certiorari, petitioner states:

> "The issue of the concealment of the citizenship of the petitioner never matured until oral argument was had before the Eighth Circuit."

In answer thereto respondent refers the Court to matters that occurred nine months before the oral arguments in this case. In Judge Denney's memorandum opinion filed January 23, 1976, the following appears:

> "However, having determined that ancillary jurisdiction exists, it is only equitable that the Court now retain jurisdiction of this 'pendent' claim. Defendant waited until trial to present its motion to dismiss. Should the Court grant defendant's motion, plaintiff would be left without a cause of action, because the Iowa Statute of Limitations has run. *Despite the fact the defendant has exclusive possession of the knowledge of the extent of its own business in Iowa, it remained silent on this issue until more than two years subsequent to the filing of the amended complaint.* No reason for the delay has been offered and undoubtedly plaintiff was lulled into believing defendant's principal place of business was in Nebraska. As a matter of sound policy and logic, ancillary jurisdiction existed once and, under the facts presented in this case, this Court must retain jurisdiction." (Emphasis added.) A.56.

Again, in the memorandum opinion of the trial court on February 6, 1976, we find:

"DENNY, District Judge

"This matter comes before the Court upon the motion of defendant for judgment notwithstanding the verdict or, in the alternative, for new trial (Filings No. 103, 104). The Court shall ignore counsel's irrational, inflammatory language in his supporting brief directed as his misconception of judicial impropriety and shall address the legal issues raised. Counsel's request for oral argument before this Court on said motions is denied.

"Defendant takes vehement exception to this Court's denying its motion to dismiss. Defendant asserts that the Court acted in contravention of direct Eighth Circuit precedent, citing *United States v. Lushbough,* 200 F. 2d 717 (8th Cir. 1952). Defendant should read this Court's Memorandum carefully. The Court based its decision on *United Mine Workers of America v. Gibbs,* 393 U.S. 715 (1966), which was decided long after *Lushbough. Likewise, defendant's exception to this Court's comments concerning defendant's long silence on the jurisdictional issue is the result of failure to comprehend the Court's holding.* This Court held that retention of ancillary jurisdiction is discretionary with the trial court. *The untimeliness of defendant's motion is unquestionably relevant to the exercise of discretion."* (Emphasis added.) A.60-61.

In the opinion in the case Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation recites:

"Appellant *finally* admitted on oral argument to us, *after close questioning,* a point clear from the pleadings, namely, that it had not specifically challenged the diversity jurisdiction of the court at any

time during the long course of the pleadings, and particularly had not done so in response to the plaintiff's amended complaint filed on November 9, 1973, charging Owen to be 'a Nebraska corporation with its principal place of business in Nebraska.' (emphasis ours)"

Respondent submits that if a favorable result based on jurisdiction can be achieved by these methods it could also be achieved by false answers to discovery interrogatories or perjury in discovery depositions — the principle would be the same. Penalties later levied against the malefactors would be of little value to a widow and children sent empty handed from the court system. Lord Campbell would probably agree.

Petitioner's brief asks some rhetorical questions intended either for the Court or the respondent and in case of the latter the possible answers are as follows:

Q. (p. 28 Petitioner's brief) If petitioner were intentionally "sandbagging" the court, why then didn't petitioner wait until the day after the statute of limitations had run on January 19, 1974 to raise the issue of lack of subject matter jurisdiction rather than waiting until the first day of trial to raise the issue?

A. Because at that time all parties were in court and petitioner's attorneys may have read *Gibbs,* the *Olson* decision of Judge Van Pelt, Messrs. *Wright & Miller, Moore's Federal Practice* and concluded that it would be better to first try to win the case on its merits or at least see how the trial was going.

Q. Why wouldn't the issue of lack of diversity of citizenship have been the subject of the motion of summary judgment which this defendant filed September 4, 1974?

A. Same answer as above coupled with the fact that it was the only defense it *thought* it could hold as an "ace in the hole" should the trial be going badly.

The next paragraph on page 28 of petitioner's brief is foundationed on an *ex parte* affidavit filed *after* the opinion of the Eighth Circuit. This affidavit was by one of petitioner's lawyers in support of another of petitioner's lawyers and contained an explanation that would have been more timely and appropriate had it been advanced in response to the "close questioning" of the Court in the oral arguments months before.

Respondent further submits that the affidavit of Mr. Becker (A. 102), relied on by petitioner, was filed after the opinion of the Court of Appeals and not subject to rebuttal by petitioner until now. Had the affiant in that affidavit been subject to cross examination, the affiant could have been confronted with the certificate of incorporation attached as an appendix hereto. This shows that from October 21, 1946 to the present time petitioner's principal place of business was at all times in Omaha, Nebraska.

> "In the case of a domestic corporation, its principal place of business is the location it so designates in its charter or certificate of incorporation." *Kibler v. Transcontinental and Western Air, Inc.*, 63 F. Supp. 724, ED., New York.

The testimony adduced by the petitioner at the trial on examination of its secretary was simply an incorrect legal conclusion of a layman regarding the phrase, "principal place of business." As to the affidavit of Mr. Becker (A. 102), the certificate of the Secretary of State indicates a probably good faith but somewhat incomplete search by Mr. Becker of his file, particularly as to its most important aspect.

Petitioner then, on page 29 of its brief, attacks respondent by splicing together an excerpt from a deposition and an excerpt from a pleading and says in effect "You should have known." In view of the fact that petitioner's attorneys were at the same deposition this nonsequitur seems in direct conflict with its protests that it itself did not know until the second day of trial.

Most supportive of the findings made by the Court of Appeals on the issue of concealment is the analysis of the language of the pleadings as contained in the timetable and the Appendix to the opinion, coupled with the fact that all three of the Judges who conducted the questioning in St. Louis came to the same conclusion on this issue. They were, in effect, the jury that "saw the witness and heard the testimony." On this issue their verdict was unanimous.

All of the foregoing is occasioned by the fact that the Fifth Amendment was raised by the petitioner, and respondent feels that it is incumbent upon her to defend against this issue and to recite facts in support of the three circuit judges' findings of intentional concealment in deference to that court. Respondent derives no satisfaction from this discussion.

It is respectfully suggested that if the matter is susceptible to just solution based solely upon the *effect* of petitioner's conduct rather than the *motivation* of the conduct, such disposition would be desirable in the interest of the image of the bar.

CONCLUSION

Subject matter jurisdiction existed and exists in this case. The preservation of at least limited flexibility vesting discretionary powers in a trial judge is a neces-

sity required by the ends of justice in some cases.

Respondent submits that this is the case of all cases justifying the foresight of this court in the hesitancy it has previously shown by narrowing its decisions to avoid the injustice of a hard, fast and inflexible prohibitory rule.

Respondent respectfully prays that the five and one-half year conflict in the federal courts by the widow of James Kroger result in the just compensation that is her entitlement.

Respectfully submitted,

Warren C. Schrempp
1600 Woodmen Tower
Omaha, Nebraska 68102
and
Richard E. Shugrue, John J. Hanley
and Thomas G. McQuade
Of Schrempp & McQuade
1600 Woodmen Tower
Omaha, Nebraska 68102
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Respondent have been mailed by first-class mail to: Emil F. Sodoro, David A. Johnson, Ronald H. Stave, 200 Century Professional Plaza, 7000 Spring Street, Omaha, Nebraska 68106, Attorneys for Petitioner.

Warren C. Schrempp

WARREN C. SCHREMPP
Attorney for Respondent

March 17, 1978

APPENDIX

STATE OF NEBRASKA

Department of State

I, Allen J. Beermann, Secretary of State of the State of Nebraska do hereby certify that

the attached is a true and correct copy of the first page of the Articles of Incorporation of Owen Equipment and Erection Co., with the registered agent and office shown as Edward F.Owen, 2534 No. 52nd St., Omaha, Nebraska, and with the principal place of business being listed as Omaha, Douglas County, Nebraska, as filed and recorded in this office on October 18, 1946; the first page of the Change of Registered Office document stating that the registered office was changed to 5420 Nicholas St., Omaha, Nebraska, as filed and recorded in this office on September 13, 1968.

I further certify that the other documents filed for Owen Equipment and Erection Co. are as follows: Articles of Merger of Owen Railway Supply Co., merging into this corporation on June 7, 1976, and no other amendments filed until the last Articles of Merger whereby this corporation merged into Paxton & Vierling Steel Co., also with registered office located in Omaha, Nebraska, as filed and recorded in this office on February 22, 1977.

This certification does not include the complete copies of documents for Owen Equipment and Erection Co.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State of Nebraska.

Done at Lincoln this Sixteenth day of March in the year of our Lord, one thousand nine hundred and seventy-eight.

Allen J. Beermann
SECRETARY OF STATE

DEPUTY

ARTICLES OF INCORPORATION

OF

OWEN EQUIPMENT AND ERECTION CO.

KNOW ALL MEN BY THESE PRESENTS: That the undersigned have organized and formed a corporation under and by virtue of the laws of the State of Nebraska and to that end have adopted the following Articles of Incorporation:

ARTICLE I

The name of this corporation shall be Owen Equipment and Erection Co.

ARTICLE II

The principal place of business of said corporation shall be located in the city of Omaha, Douglas County, Nebraska, and the corporation's resident agent is Edward F. Owen, 2534 North 52nd Street, Omaha, Nebraska.

ARTICLE III

The general nature of the business to be transacted by the corporation, and the objects and purposes for which it is organized shall be as follows:

To buy, sell, lease, manufacture, fabricate, process and generally deal in and with any and all types of machinery, fixtures, tools, appliances and equipment or other personal property of any kind or character, promote and develop new ideas and processes for the production thereof, to erect, assemble and install all types and manners of structures and equipment;

To take, own, hold, mortgage or otherwise encumber, and to buy, lease, sell, exchange or in any manner dispose of real estate or personal property of every class and description both within the State of Nebraska and elsewhere;

To enter into, make and perform contracts of every kind for any lawful purpose with any person, firm, association, corporation, public or private;

To do any or all of the things herein set forth to the same extent as natural persons might or could do, and in any part of the world, as principals, agents, trustees or otherwise, and either alone or in company with others;

IN GENERAL, to carry on any business in connection therewith not forbidden by the laws of the State of Nebraska and with all of the powers conferred upon corporations by the laws of the State of Nebraska.

DOMESTIC
CHANGE OF REGISTERED AGENT AND/OR REGISTERED OFFICE

To: FRANK MARSH, Secretary of State, Lincoln, Nebraska

1. The name of this corporation is Owen Equipment and Erection Co. (name of corporation), and said corporation is organized under the laws of the State of Nebraska, with principal office located at 5420 Nicholas Street (street) Omaha (city) Nebraska (state), and that pursuant to the laws of the State of Nebraska, does hereby wish to change its Registered Agent and/or Registered Office, in the State of Nebraska.

2. The address of its present registered office is 2536 No. 52d Street (street) Omaha (city) Douglas (county) NEBRASKA.

3. If the address of its registered office be changed, the address will be: 5420 Nicholas Street (street) Omaha (city) Douglas (county) NEBRASKA.

4. The name of its present registered agent is Edward F. Owen (name) 5420 Nicholas Street (street) Omaha (city) Douglas (county) NEBRASKA.

5. If the registered agent be changed the successor registered agent shall be: N/A (name) (street) (city) (county) NEBRASKA.

6. The corporation further states that the address of its Registered Office and the address of the business office of the Registered Agent are identical.

The changes designated above were authorized by resolution duly adopted by the Board of Directors on the 13 day of August, 1968.

Dated this 13 day of August, 1968

Edward F. Owen
(must be signed by either the President or a Vice President of the corporation)
Edward F. Owen, President

Fee: Filing $5.00
Recording 1.00
$6.00

Form No. CD 1
SUBMIT TO THE SECRETARY OF STATE IN DUPLICATE.

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